**KUMPULAN PROMISTA DEVELOPMENT SDN BHD** *a*

**v.**

**HAW AH BEE CONSTRUCTION SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR *b*
KC VOHRAH J
[NOTICE MOTION NO: R1-25-42-1998]
19 OCTOBER 1999

***CIVIL PROCEDURE:*** *Judgments and orders - Perfected order - Setting aside - Order of High Court to enforce arbitration award obtained and perfected - Allegation of fundamental error by arbitrator - Whether court of co-ordinate jurisdiction may allow extension of time to set aside arbitration award - Whether court of co-ordinate jurisdiction can give order which has the effect of setting aside perfected order - Whether allegation of fundamental error ought to have been raised to resist order to enforce award* *c* *d*

This was an application to extend time in order to enable the applicant to set aside an arbitration award. The respondent had proceeded to obtain an order of the High Court to enforce the said arbitration award and this order had been perfected. The applicant, who was absent at the hearing requesting the order to enforce the said award, did not apply to set aside the order for the enforcement of the said award nor was an appeal lodged against the same. The applicant argued that because the arbitrator had allegedly made a fundamental error in awarding compensation on a wrongful basis when it was not open to him to do so, the perfected High Court order could be set aside *ex debitio justitiae*. *e* *f*

**Held:**

**[1]** Since the High Court order for the enforcement of the arbitration award had been perfected, a court of co-ordinate jurisdiction cannot give an order which has the effect of setting that perfected order aside. It is not open for this court by allowing the application for extension of time, to, in effect, set aside the order made by a court of co-ordinate jurisdiction in the circumstances. *g*

**[2]** The applicant's argument that compensation was awarded on a wrongful basis is a matter that could have been raised in resisting the proceedings to enforce the award. *h*

*[Application dismissed with costs.]*

*i*

**Case(s) referred to:**
*Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75* ***(dist)***
*State Government of Sarawak Chin Hwa Engineering Development Co [1995] 4 CLJ 1* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 42 r. 13, O. 69 r. 4(b)

*For the applicant - Baljit Singh (Abdul Shukor with him); M/s Shukor Baljit & Partners*
*For the respondent - CC Choo; M/s CC Choo & Co*

*Reported by S Dharmendran*

## JUDGMENT

**KC Vohrah J:**

There is an application before me to extend time in order to enable the application to apply to this court to set aside an arbitration award made on 28 May 1997.

Under O. 69 r. 4(b) of the Rules of the High Court 1980 (RHC) an application to set aside the award may be made at any time within six weeks after the award has been made and published to the parties. There has been a delay of about nine months for this application (filed on 25 February 1998) from the date of the award.

On 17 September 1997 in OS R2-24-52-1997 an order was obtained by the Tetuan Haw Ah Bee Construction Sdn Bhd (the respondent presently) to enforce the arbitration award. Under O. 42 r. 13 of the RHC an applicant who wishes to set aside the order must make his application to the court within 30 days after the receipt of the order by him. There is no application to set aside the order.

Since the High Court order for the enforcement of the arbitration award has been perfected I do not see how a court of co-ordinate jurisdiction may give an order which has the effect of setting that perfected order aside. The argument that the arbitrator had awarded compensation on a *quantum meruit* basis and not a contractual basis is a matter that could have conceivably been raised in the earlier proceedings by the party concerned resisting such proceedings to enforce the award (see the case of *State Government of Sarawak v. Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 at 244 where the matter of such "passive remedy" is briefly discussed) but the party was absent at the hearing of the originating summons. The party concerned did

not apply to have the matter set aside nor did the party appeal against the order. The case precedent cited by counsel for the party to support the argument that the earlier order of the High Court can be set aside does not in fact support the argument which he takes. Counsel had argued that because the arbitrator is alleged to have made a fundamental error in allowing the claim on the basis of *quantum meruit* when it was not open to him, the perfected High Court order can be set aside *ex debitio justitiae* and relied on *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393. But the case cited is concerned with an order of sale relating to a transaction which was prohibited by statute and which consequently was set aside *ex debitio justitiae*. Here there is no issue of the matter of a contravention of a prohibition by statute. It is not open for this court by allowing the application for extension in time, to, in effect, set aside the order made by a court of co-ordinate jurisdiction in the circumstances.

In my view the application for extension of time to file the arbitration order made on 28 May 1997 cannot be entertained as there has been a supervening event where the order of its enforcement has been obtained in the High Court which is already perfected.

The whole of encl. 7 which includes the application to set aside the award and the application for leave to file such application for extension of time is dismissed with costs.